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IN THE
Supreme Court of the United States
OCTOBER TERM, 1990

CITY GAS COMPANY OF FLORIDA,
Petitioner,

v.

CONSOLIDATED GAS COMPANY OF FLORIDA, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

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February 15, 1991

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

Pursuant to Rule 37.2, the American Gas Association (hereinafter referred to as "A.G.A." or "the Association") hereby respectfully moves for leave to file the attached brief as amicus curiae in support of City Gas Company of Florida's petition for writ of certiorari. The consent of counsel for petitioner City Gas Company of Florida has been obtained. Counsel for respondent Consolidated Gas Company of Florida, Inc. has objected.

A.G.A. is a national non-profit trade association representing the interests of its approximately 250 member

companies involved in the distribution and transmission of natural gas throughout the United States. Petitioner City Gas Company of Florida (City Gas) is currently a division of Elizabethtown Gas Company, a member of A.G.A. A.G.A. member companies serve approximately 160 million consumers and provide 85 percent of the nation's natural gas utility sales. Almost all local gas distribution company members of A.G.A. operate under state or local franchises or are subject to state public service commission rules or orders that restrict their operating territories to defined geographical areas.

This case raises important concerns regarding the interplay between the federal antitrust laws and the deference due state public utility regulatory commissions under the state action doctrine. Of particular concern to the Association is the lower courts' holdings in this case that the state action doctrine does not immunize a territorial agreement between two gas utilities where that agreement was (1) specifically approved by a state public utility commission as being in the public interest and (2) upheld by the state's highest court as a necessary exercise of the state public service commission's authority. The Association believes this opinion is contrary to controlling precedent and could lead to decisions undermining the authority of state legislatures and state public service commissions to use state police powers to regulate effectively local natural gas distribution companies.

The Association's concern with the lower courts' decisions arises out of its beliefs that these courts have (1) misinterpreted the state action immunity doctrine and (2) misunderstood the central role of territorial restrictions in the regulation of natural gas distribution companies. The attached *amicus curiae* brief is intended to explain the important role territorial restrictions play in regulating gas utility companies. In this brief the Association traces the role of territorial restrictions in public utility regulation and why such restrictions have been

determined to be critical in protecting utility customers from excessive rates and charges. The generally recognized goal of public utility regulation is to ensure safe, reliable service to utility customers on reasonable terms and conditions. To achieve these goals state public utility commissions have adopted, promoted or approved territorial restrictions that have the effect of limiting direct competition between local gas distribution companies.

This perspective on the role of territorial agreements in utility regulation has not been brought to the Court's attention in petitioner's brief. The Association believes that a failure to understand the regulatory importance of territorial restrictions may lead to further intrusion by federal courts into an area pervasively regulated by state public utility commissions. The Association believes it has a unique and important perspective on this issue which should be useful to the Court in determining the desirability of granting the requested writ of certiorari.

For the reasons stated above, the Association respectfully requests the Court grant this motion so that it may present its views in the attached brief.

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE AMERICAN GAS ASSOCIATION IN SUPPORT OF PETITIONER

The American Gas Association (hereinafter "A.G.A." or "the Association") submits this brief *amicus curiae* in support of the petition for a writ of certiorari filed by petitioner City Gas Company of Florida (City Gas).

INTEREST OF THE *AMICUS CURIAE*

The A.G.A. is a national trade association representing the interests of some 250 member companies involved in the distribution and transmission of natural gas throughout the 50 states and the District of Columbia. A.G.A. member companies account for approximately 85% of this nation's annual gas utility sales. The vast majority of A.G.A.'s member companies distribute natural gas to residential, commercial and industrial customers and are extensively regulated by state public utility commissions. Almost all local gas distribution company members of

A.G.A. operate under state or local franchises or are subject to state public service commission rules or orders that restrict their operating territories to defined geographical areas.

The Association requests this Court grant the writ of certiorari for the reasons set forth in the petition of City Gas. The Association is particularly concerned with that portion of the opinion of the United States Court of Appeals for the Eleventh Circuit holding that the state action doctrine does not immunize a territorial agreement that was specifically approved by a state public utility commission as being in the public interest and upheld by the state's highest court as a necessary exercise of the state public service commission's authority. This holding is contrary to controlling precedent and could undermine the authority of state legislatures and state public service commissions to use state police powers to regulate effectively local natural gas distribution companies.

The Association believes the Eleventh Circuit decision and the district court opinion could call into question numerous franchises, territorial agreements, public utility commission decisions and state laws which have been designed and operated to provide detailed state and local regulation of natural gas distribution companies. Many of the prevailing utility regulatory structures developed over the last century in this country would have to be reexamined and modified if the Eleventh Circuit's narrow reading of the state action doctrine were to be followed.

The issuance and control of franchises and the creation of territorial arrangements and restrictions are activities that go to the very core of public utility regulation. As discussed below, states have developed various mechanisms to control and monitor these territorial restrictions. These restrictions and procedures have developed over the past one hundred years based upon a generally held belief that the provision of natural gas service is a natural monopoly that is best allowed to operate subject to

strict state scrutiny.[1] The Association is concerned that the Eleventh Circuit's opinion fails to comprehend the intense scrutiny under which natural gas companies operate and fails to provide proper deference to the decisions of the Florida state legislature, the Florida Public Service Commission, and the Florida Supreme Court.

SUMMARY OF ARGUMENT

The Eleventh Circuit erred in holding that the state action did not immunize a gas utility's conduct under a territorial agreement examined and approved by a state public utility commission as being in the public interest. Absent review of this decision and its reversal by this Court numerous utility franchises, territorial agreements, public utility commission decisions and state laws may be called into question.

The lower courts' decisions potentially undermine the ability of state public utility commissions to maintain and enforce a comprehensive scheme of state regulation by calling into question the present use of territorial restrictions on local natural gas distribution companies. The opinions below fail to comprehend the central role such restrictions play in the regulation of public utilities and the problems associated with the use of antitrust laws to override these restrictions. Territorial restrictions were developed to avoid forcing captive utility customers to pay uneconomic and unnecessary costs.

The lower courts' decisions also countermand an express state statutory command barring any entity from requiring a public utility to sell natural gas at wholesale. The courts' decisions strike at the core of the state action doctrine by attempting to read out of existence an express and unequivocal legislative dictate.

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[1] *See, e.g.*, J.C. Bonbright, A.L. Danielsen, D.R. Kamerschen, *Principles of Public Utility Rates*, at 633 (2d ed. 1988) ("Local [gas] distribution companies are generally conceded to be natural monopolies.") and at 17-25 (discussion of natural monopolies).

Review of the Eleventh Circuit's *en banc* opinion is necessary to clarify the deference to be accorded state public utility commissions in their regulation of public utilities and to allow this Court to determine the proper application of the state action doctrine to the conduct of public utilities in areas where their actions are subject to on-going review by public utility commissions.

ARGUMENT

City Gas is a local gas distribution company selling gas within a service territory in Southern Florida. The boundaries of this service territory were set in 1960 and were embodied in a Territorial Agreement between City Gas and another local gas distribution company. This Territorial Agreement was submitted to the predecessor of the Florida Public Service Commission (Commission or PSC) for its approval. The Commission studied the Territorial Agreement and found it to be in the public interest. Pet. App. I. The Commission in its Order approving the agreement set out detailed reasons why this territorial agreement was in the public interest and found that this agreement would avoid "unnecessary and uneconomical duplication of plant and facilities . . . ." Pet. App. I-2. Without such an agreement, gas customers would be harmed by such duplication and would be forced to pay higher rates for essential services. *Id.* The Commission's views on this issue were then, and are now, widely held by public utility commissions and noted authorities in the field of public utility regulation.[2]

A few years after the Florida Public Service Commission approved the Territorial Agreement, a dispute arose

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[2] *See, e.g.*, C.F. Phillips, Jr., *The Economics of Regulation* (1965) at 85 ("[c]ompetition in certain industries is apt to become ruinous to the disadvantage of both consumers and investors."); J.C. Bonbright, A.L. Danielsen, D.R. Kamerschen, *Principles of Public Utility Rates*, at 19 (2d ed. 1988) (competition between public utilities "is wasteful of resources because it involves unnecessary duplication of facilities.").

between the parties to the agreement. City Gas challenged the validity of the Territorial Agreement, arguing that the Florida Commission lacked statutory authority to approve the agreement and the agreement violated state antitrust laws and the Sherman Act. Both the Third Circuit District Court of Appeal of Florida and the Supreme Court of Florida found the Commission had authority to approve the agreement and that the agreement, as approved, did not violate Florida antitrust laws.[3] The state Supreme Court found that "the practical effect of [the Commission's] approval is to make the approved contract an order of the commission, binding as such upon the parties."[4] The Court also found that the agreement could not violate state antitrust law because it did not threaten "to result in monopolistic control over prices, production, or quality of service . . . ."[5] According to the state Supreme Court, such monopolistic abuses could not occur because of the Commission's "very extensive authority over the fortunes and operation of the regulated entities."[6]

I. THE ELEVENTH CIRCUIT'S MAJORITY OPINION FAILS TO COMPREHEND THE PERVASIVE NATURE OF STATE PUBLIC UTILITY COMMISSION REGULATION AND THE ROLE OF TERRITORIAL RESTRICTIONS IN THE REGULATION OF LOCAL NATURAL GAS DISTRIBUTION COMPANIES.

The district court and the panel below in its opinion concluded that the Territorial Agreement between City Gas and Peoples Gas violated Section 2 of the Sherman

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[3] The two courts did not address the federal antitrust claims. The trial court, which had held the Territorial Agreement violated Florida antitrust law, did not rule on the federal claim.

[4] City Gas Company v. Peoples Gas System, Inc., 182 So. 2d 429, 436 (Fla. 1965).

[5] *Id.* at 434.

[6] *Id.* at 435.

Act and was not immune under the state action doctrine. In an *en banc* opinion the Eleventh Circuit affirmed this conclusion by a 5-5 vote. Chief Judge Tjoflat's dissenting opinion (Pet. App. B-141-59) demonstrates clearly that this territorial agreement was subject to a clearly articulated and affirmatively expressed state policy that was actively supervised by the state itself.[7]

To better understand Florida's pervasive utility regulatory scheme it is helpful to understand the role of utility geographic and market restrictions generally and their impact on utility rates. The State of Florida's structure for regulating natural gas utilities shares significant features with the regulatory structures adopted in most other states. These regulatory structures grew out of a rich history of experiments in public utility regulation and attempts to use state police power to regulate gas utilities in the public interest.

The regulation of natural gas utilities and the imposition of territorial restrictions developed simultaneously during the nineteenth century. Exclusive franchises to early gas lighting companies were first granted in the early 1800's by cities and state legislatures.[8] However, "the franchise as actually used proved a defective instrument for public regulation."[9] They were often poorly drafted, inflexible, and not suited for protecting the public interest in safe, cost-efficient and reliable gas service.[10]

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[7] *See* California Retail Liquor Dealers Association v. MidCal Aluminum, Inc., 445 U.S. 97, 100 (1980). Consistent with this Court's Rule 37.1, A.G.A. will not repeat the discussion and analysis of the state action doctrine contained in petitioner's brief. A.G.A. supports that analysis.

[8] *See* I *Regulation of the Gas Industry*, § 1.04 (American Gas Association ed. 1990).

[9] C.F. Phillips, Jr., *The Economics of Regulation* at 88 (1965) (hereinafter Phillips).

[10] *Id.* at 88-90.

Direct regulation by state legislatures also proved ineffective. The Court's 1898 decision in *Smyth v. Ames* [11] was said to sound the "death knell" for efforts of state legislatures to regulate utilities directly.[12] "It did this by setting up such an exacting set of standards . . . for determining the reasonableness of utility rates, that it became apparent that regulation was a full-time job. . . . [A]s a result of *Smyth v. Ames* state regulatory commissions, meaning specifically organized boards, with powers over specified utility operations, became a virtual necessity." [13]

There were practical as well as economic reasons for state commissions to be able to impose territorial restrictions on local natural gas distribution companies. As a practical matter, allowing competing gas distribution companies to operate in the same geographical area raised safety and operational concerns. City streets would be dug up twice as often as competing gas companies installed competing lines. Multiple and duplicative gas lines increased safety concerns regarding gas leaks. Perhaps more importantly, such competition led to higher, not lower, gas consumer rates because a regulated natural gas utility is required to be allowed a fair return on its investment in plant and equipment.[14] If two gas lines were built and maintained where one gas line would be adequate, gas company customers would be forced to absorb these higher costs through higher rates. Thus, the creation of competition in areas characterized as natural monopolies leads not to reduced costs but to higher costs and economic waste. This situation led to state laws de-

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[11] 169 U.S. 466 (1898).

[12] Phillips at 85.

[13] F.X. Welch, *Cases and Text on Public Utility Regulation* at 543 (Public Utilities Reports, Inc., 1961), *as quoted in* Phillips at 85.

[14] *See, e.g.*, Smyth v. Ames, 169 U.S. 466 (1898); C.F. Phillips, Jr., *The Regulation of Public Utilities* at 4-7, 301-42 (Public Utilities Reports, Inc. 1988).

signed to allow state public commissions to control the growth of public utilities to afford control over the utility's rate base and, ultimately, consumer rates.

Almost every state having investor-owned natural gas utilities making retail sales within the state regulates the gas utilities' rates.[15] The vast majority of states also require a certificate of public convenience and necessity before an investor-owned gas utility may initiate service.[16] Most states further require such a certificate before a natural gas utility may abandon facilities or service.[17]

> The certificate of public convenience and necessity is vital at both state and federal regulatory levels. By what is the substantially uniform rule, no public utility may commence the construction of major facilities, begin operations or abandon them, *enter new territory, exercise rights under a franchise,* or issue securities, among other functions, until it has obtained from the commission having jurisdiction a certificate to the effect that the present or future public convenience and necessity require or will require the action contemplated. Most utilities are controlled monopolies (at least to greater or lesser extents) and the certificate of public convenience and necessity, as granted, conditioned, denied, withdrawn or modified, implements that control.[18]

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[15] 1 *Energy Law and Transactions* § 4.03[2][b] (1990); National Association of Regulatory Utility Commissioners, *1989 Annual Report on Utility and Carrier Regulation,* Table 4 at 558 (1990) (hereinafter *NARUC Report*).

[16] *NARUC Report,* Table 67 at 560 and Table 62 at 549.

[17] *NARUC Report,* Table 68 at 562.

[18] A.J.G. Priest, *Principles of Public Utility Regulation,* Vol. 1 at 347 (1969) (emphasis added). *See also* 1 *Energy Law and Transactions* at § 2.05[1]; C.F. Phillips, Jr., *The Regulation of Public Utilities* at 515-16 (Public Utilities Reports, Inc. 1988) ("Certificates of public convenience and necessity are required to provide public utility services. . . . The intended purpose of such [entry]

Not all states have adopted the use of a formal certificate of public convenience and necessity to control the service territory of a natural gas utility.[19] Florida is one such state that has not deemed it necessary to require the issuance of a formal certificate document.[20] However, even those few states that do not use a formal certificate or franchise arrangement to allocate utility territories have the ability to restrict territorial competition by the use of other measures. For example, a large number of states, including Florida, authorize the public utility commission to regulate natural gas utilities by authorizing or requiring interconnections of gas lines,[21] requiring joint use of facilities,[22] and requiring line extensions within the area served.[23]

Florida, along with most states, also has in place a number of statutory provisions that empower the public

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control is to regulate competition *within* each industry, thereby preventing over-investment in high fixed-cost industries and encouraging the achievement of economies of scale.").

[19] *See NARUC Report*, Tables 67, 68, 69, 70, 71, 72, 73A, 73B, and 74, at 560-76.

[20] Following the district court's opinion the Florida Legislature did codify existing Commission authority over territorial agreements between natural gas companies. That provision expressly authorizes the Commission to "approve territorial agreements between and among natural gas utilities" and to resolve territorial disputes. Significantly, the new provision is not intended "to alter existing territorial agreements between the parties to such agreements." Fla. Stat. Ann. § 366.04(3) (1989 Supp.). The state senate committee staff report which led to the 1989 amendment makes it clear that the amendment was intended to overturn the interpretation adopted by the lower courts in this case. *See* Staff of Senate Economic, Professional and Utility Regulation Committee, *A Review of Chapter 366, Florida Statutes Relating to Public Utilities* at 35 (1989).

[21] *NARUC Report*, Table 62 at 549.

[22] *NARUC Report*, Table 63 at 551.

[23] *NARUC Report*, Table 63 at 551; Fla. Stat. Ann. § 366.05.

service commission to control the types of anticompetitive practices that the federal antitrust laws are designed to combat. For example, Florida's public utility statutes provide: "[n]o public utility shall make or give any undue or unreasonable preference or advantage to any person or locality, or subject the same to any undue or unreasonable prejudice or disadvantage in any respect";[24] the Commission "shall have jurisdiction to regulate and supervise each public utility with respect to its rates, *service* . . .";[25] the Commission "shall have the power to prescribe . . . *service rules* and regulations to be observed by each public utility";[26] the Commission may require "*additions and extensions to the plant and equipment of any public utility reasonably necessary to promote the convenience and welfare of the public*";[27] and "to prescribe all rules and regulations reasonably necessary and appropriate for the administration and enforcement of this chapter; and to exercise all judicial powers, issue all writs and do all things, necessary or convenient to the full and complete exercise of its jurisdiction and the enforcement of its orders and requirements."[28] If the Congress finds a utility practice affecting rates to be "unjust, unreasonable, insufficient, or unduly discriminatory or preferential, or in anywise in violation of law, *or any service is inadequate or cannot be obtained*" the Commission is required to promulgate "rules, regulations, measurements, practices, contracts *or service*" to be imposed in the future.[29] Finally, Commission orders are re-

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[24] Fla. Stat. Ann. § 366.03.

[25] *Id.* § 366.04 (emphasis added).

[26] *Id.* § 366.05 (emphasis added).

[27] *Id.* (emphasis added).

[28] *Id.*

[29] *Id.*, § 366.07 (emphasis added). As discussed, *supra*, territorial restrictions are practices that affect utility rates and in their absence there is duplication of facilities. Because each public utility

viewable by the state supreme court [30] and willful violations of the public utility laws or Commission rules are punishable by a fine not to exceed $5,000 per day.[31]

The above statutory provisions, coupled with the Commission's more detailed regulations, clearly provide the requisite authority to approve territorial restrictions. Moreover, the Florida Supreme Court has determined that the Commission has indisputable authority to modify any service territory agreements it may have approved. As the Florida Supreme Court stated in one of its decisions dealing with the Territorial Agreement at issue here:

> Nor can there by any doubt that the Commission may withdraw or modify its approval of a service area agreement, or other order, in proper proceedings initiated by it, a party to the agreement, or even an interested member of the public.[32]

It is within the context of the nature of public utility regulation generally and Florida's statutory framework specifically, that this Court must examine state actions involving territorial restrictions on natural gas utilities. The language embodying Florida's statutory scheme must be examined in light of two beliefs central to na-

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is entitled an opportunity to earn a reasonable return on its facilities, such duplication causes an increase in consumer rates. *See* FPSC Order No. 3051, In re: Territorial Agreement between Peoples Gas System, Inc. and City Gas Company of Florida, Pet. App. I-2; W.K. Jones, Origins of the Certificates of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 Col. L. Rev. 426, 433 ("The earning power of a [public service] company was directly proportional to its investment or 'rate base': a larger investment meant a larger constitutionally mandated return, which in turn meant higher rates for the company's customers.").

[30] *Id.* § 366.10.

[31] *Id.* § 366.12.

[32] Peoples Gas System, Inc. v. Mason, 187 So. 2d 335 (Fla. 1966).

tural gas utility regulation within this country. First, that the public interest is not served by fostering direct competition between local natural gas utilities and, second, that to the extent any such competition is to be condoned, it must be specifically authorized and regulated by a state public service commission.

As Chief Judge Tjoflat stressed in his dissenting opinion, the district court erred in overemphasizing the absence of an express grant of power to approve territorial agreements between natural gas utilities. Pet. App. B-149. That power was embodied in Chapter 366 of the Florida statutes, which, as discussed above, prescribes the duties of Florida utility companies and the very broad responsibilities of the Florida Public Service Commission. Given the near universal consensus in this country opposing direct competition between natural gas utilities, the appropriate question is whether the Florida legislature intended to act in a manner inconsistent with well-established regulatory precepts embraced by the vast majority of states. The evidence in this record suggests it did not. The similar concerns with the lower courts' interpretation of Florida law raised by the Florida Public Service Commission in its briefs *amicus curiae* and the subsequent action by the Florida legislature to amend the statute to expressly authorize the Florida PSC to approve territorial agreements between natural gas companies (Pet. App. B-149 n.85) makes clear that there is in Florida a clearly articulated, affirmatively expressed and actively supervised state policy in favor of territorial restrictions on natural gas utilities. As this Court has recognized, "[r]equiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." [33]

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[33] Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 64 (1985).

II. THE LOWER COURTS' DECISIONS EVISCERATE THE FLORIDA LEGISLATURE'S CLEAR COMMAND BARRING ANY ENTITY FROM REQUIRING A PUBLIC UTILITY TO MAKE A SALE FOR RESALE.

The district court concluded that City Gas' refusal to sell gas to Consolidated on terms acceptable to Consolidated constituted an illegal refusal to deal in violation of § 2 of the Sherman Act and ordered City Gas to furnish gas to Consolidated. Pet. App. D-95-6. The lower Court's actions ignore the Florida state legislature's express determination that natural gas utilities shall not be required to provide service for resale. The Florida legislature has explicitly provided by statute that "no public utility shall be required to furnish electricity or gas for resale. . . ." Fla. Stat. Ann. § 366.03 (Harrison 1980). It is difficult to imagine a clearer statement by a state legislature that it does not wish to impose a duty on an otherwise heavily-regulated company. City Gas is a public utility as defined by the statute[34] and thus may not be required to serve Consolidated.

The district court's opinion undermines the plain meaning of the statute in two ways. First the court speculates that the state's sole concern was that requiring utilities to make sales for resale would leave the rates for sale of this gas to ultimate consumers beyond the jurisdiction of the Florida PSC. Pet. App. D-81-2. However, the evidence supporting this supposition appears to suggest that the state was concerned with protecting broader interests. The District Court stated that "the statute appears to be derived from *Florida Power & Light Co. v. State ex rel. Malcolm*, 107 Fla. 317, 144 So. 657 (1932)." A reading of that case makes clear that the Florida Supreme Court's holding that a utility could not be compelled to make a sale for resale was based on a utility's right to have enforced its reasonable regulations. The concern

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[34] Fla. Stat. Ann. § 366.02.

expressed by the District Court, although mentioned in the opinion, was found by the Florida Supreme Court to be "not necessary to be decided in this case; therefore no opinion is expressed thereon." *Florida Power & Light Co. v. State ex rel. Malcolm*, 144 So. at 659. If the legislature's sole concern was to protect consumers from paying rates not subject to Florida PSC jurisdiction it could have written the statute to deal with this narrow problem. Instead it imposed an absolute bar on any entity requiring a public utility to furnish gas for resale.[35] Given the plain language of the statute, it was clearly error for the lower courts to eviscerate it without a clearer basis for divining the legislature's statutory intent.

The district court's second ground for reading away the plain language of § 366.03 is that there was inadequate active state supervision under the second prong of

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[35] There may be a number of reasons why the Florida legislature would wish to impose this broad bar. First, for the reasons discussed above, it could well have been concerned with preserving an existing gas company's natural monopoly against any attempts to undermine it. Second, the Florida legislature may have been concerned with possibly subjecting a local gas company to regulation by the Federal Power Commission. The Natural Gas Act provides that the Federal Energy Regulatory Commission (formerly the Federal Power Commission) shall regulate companies engaged in the "sale in interstate commerce of natural gas for resale for ultimate public consumption . . . ." 15 U.S.C. § 717(b) (1982). In 1954 the Natural Gas Act was amended to provide that federal regulation would not apply to a company that engaged in a sale for resale if the gas was received from another person within or at the boundary of a state. 15 U.S.C. § 717(c). Thus if a local gas distribution company were to engage in a sale for resale and received the gas outside the state it would be regulated by the Federal Energy Regulatory Commission as a natural gas company. A simple way to avoid a possible conflict between state and federal regulation is to do what the Florida legislature did—bar anyone from requiring the gas utility to make a sale for resale.

the *Midcal Aluminum*[36] test. Pet. App. D-66-8. However, if the Florida legislature, in its capacity as sovereign, acts to bar the imposition of some duty by statute, conduct consistent with the statute is exempt from antitrust liability.[37] Here the state has spoken by statute and has left no room for another supervisory body to act. The statement that "no public utility shall be required to furnish electricity or gas for resale" ties the hands of all and requires no implementing action by the Florida PSC.

Given the plain language of Fla. Stat. § 366.03 barring anyone from forcing a gas company to sell gas for resale, the Association is greatly concerned that the court's opinion will subject to attack other state statutes that spell out precise duties and restrictions applicable to public utility companies. Our concern is heightened particularly because the Florida legislature seemingly took great pains to avoid such a result. The Florida "Legislative declaration" that opens the chapter on regulation of public utilities prominently states that "this chapter shall be deemed to be an exercise of the police power of the state for the protection of the public welfare and all the provisions hereof shall be liberally construed for the accomplishment of that purpose." Fla. Stat. Ann. § 366.01. As discussed above, there is broad consensus among utility regulators in this country that competition between local gas distribution companies is contrary to the public welfare. Given this generally held view it is particularly egregious for a district court to be able to ignore the dictates of a clear statutory command on one hand, while

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[36] California Retail Liquor Dealers Association v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[37] In finding that a state action is exempt from antitrust liability the "only requirement is that the action be that of 'the State acting as a sovereign.'" *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) *quoting Bates v. State Bar of Arizona*, 433 U.S. 350, 360 (1977). "[W]hen a state legislature adopts legislation, its actions constitute those of the State . . . and ipso facto are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. at 567-68.

imposing a crabbed and unreasonably confining interpretation of a state's public regulatory scheme on the other. To do so raises the *Midcal* "clear articulation" standard far above the level this Court has set and suggests "an unrealistic view of how legislatures work and of how statutes are written." [38]

III. SUPREME COURT REVIEW IS WARRANTED TO CLARIFY THE "ACTIVE SUPERVISION" PRONG OF *MIDCAL* AS IT IS APPLIED TO THE REGULATORY SCHEME UNDER WHICH UTILITY REGULATORY COMMISSIONS OPERATE.

Of particular concern to the Association is the lower courts' characterizations of the Florida Public Service Commission's oversight of territorial agreements. The district court stated that it appears:

> The FPSC enforces the agreement or considers its revision, after a hearing, *only* when someone complains to it or petitions for a review of the agreement. The FPSC does not review the agreement on its own initiative. . . . There is no evidence that the FPSC has established any standards for the creation of territorial agreements or that territorial agreements are reviewed on a regular basis in the absence of a petition by a party or utility customer for reconsideration. On this record, we find that the FPSC does not adequately supervise natural gas territorial agreements and accordingly, we must conclude that the second prong of the *Midcal Aluminum* test has not been met.

Pet. App. D-67-8.

The Eleventh Circuit's opinion, in the same vein:

> Simply because the Commission has on occasion, some 15 to 25 years ago, looked at this agreement does not automatically immunize it from federal antitrust

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[38] Town of Hallie v. City of Eau Claire, 471 U.S. 34, 43 (1985).

> scrutiny. . . . This is at bottom an agreement entered into by private parties, in pursuit of their own economic interests, that is neither authorized by the State, nor closely monitored by it. The minimal contact the Commission has had with this agreement is nothing more than a "gauzy cloak of state involvement" which does not protect it from the constraints of federal antitrust regulation. *Midcal*, 446 U.S. at 106, 100 S. Ct. at 943.

Pet. App. A-11.

As previously noted, Florida's statutory scheme provides a far greater level of scrutiny than indicated by the above language. Territorial agreements are not valid unless approved by the Commission;[39] may be terminated or modified by action of the Commission;[40] and action to modify or terminate agreements may be initiated by the Commission, a party to the agreement, or any interested member of the public.[41] Florida thus vests its regulatory commission with utility regulatory powers similar to those found in practically every other state. To find, as the lower courts have done here, that this regulatory scheme fails to pass muster under the "active supervision" prong of *Midcal* raises serious concerns among our member companies. Under the Eleventh Circuit's reading of the law, it appears that to maintain antitrust immunity for public utility commission-approved territorial restrictions, a natural gas distribution company would be required to resubmit all such territorial restrictions to its state commission for periodic review. Even such resubmissions to state commissions would not appear to be adequate. Instead it would appear necessary for the state commission to hold some type of hearing.

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[39] Order Approving Agreement, Pet. App. I-2; City Gas Co. v. Peoples Gas System, 182 So. 2d at 436.

[40] Peoples Gas System, Inc. v. Mason, 187 So. 2d at 339.

[41] *Id.*

The Association submits such a result is neither practical nor desirable. In most states any interested ratepayer may participate in utility regulatory proceedings.[42] Almost every state also represents its citizens' concerns through the utility commission staff, a separate people's counsel or both.[43] Competitors and would-be competitors alike may challenge existing regulatory practices. State consumer groups or other ad hoc groups routinely participate in utility proceedings. Thus, state public utility commissions are not shielded from the public spotlight and any arguably anticompetitive actions can be and will be subject to scrutiny. Given the framework of public utility regulation, great deference should be given to public utility commission actions that restrict competition to further the public interest.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[42] *See NARUC Report*, Tables 15 and 16 at 430-43.

[43] *See id.*, Table 237 at 934-36 (state representation of consumer interest other than by regulatory agency); Table 226 at 905-06 (agency provision of assistance to intervenors).